

**LETTER OPINION**  
**2000-L-156**

November 2, 2000

Mr. Neil W. Fleming  
Pembina City Attorney  
PO Box 633  
Cavalier, ND 58220-0633

Dear Mr. Fleming:

Thank you for your letter requesting my opinion on whether a home rule city which includes in its charter the fiscal powers set out in N.D.C.C. § 40-05.1-06(2) may borrow money for street improvements from a local financial institution without issuing improvement bonds or warrants under N.D.C.C. ch. 40-24.<sup>1</sup> For the reasons set out below, it is my opinion that a home rule city which includes in its charter the fiscal powers contained in N.D.C.C. § 40-05.1-06(2) may borrow money for street improvements from a local financial institution if the borrower's authority is implemented through an appropriate ordinance.

You indicate in your letter that the city has established a street improvement district pursuant to N.D.C.C. ch. 40-22 and has decided to finance the costs of the street improvements by special assessments. You further indicate that a local financial institution has agreed to lend the city funds to pay for the improvements repayable solely from special assessments collected from the owners of the benefited property.<sup>2</sup>

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<sup>1</sup> Although your letter made reference to using home rule powers to borrow money without issuing revenue bonds, revenue bonds are issued pursuant to N.D.C.C. ch. 40-35. That chapter does not generally permit the issuance of revenue bonds to finance street improvements. See N.D.C.C. § 40-35-02. A member of my staff confirmed with you that you were using the term revenue bonds in a more general sense and that your question really pertained to whether the home rule city could borrow money without issuing improvement bonds or warrants under N.D.C.C. ch. 40-24.

<sup>2</sup> Because you indicate the bank loan would be repayable solely from collections of special assessments, presumably the city would not be required or authorized to levy a tax under N.D.C.C. § 40-26-08 if such collections are insufficient to repay the bank loan. It is unclear from your letter if the benefited property could be sold pursuant to N.D.C.C. ch. 40-25 to enforce collection of the special assessments.

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Home rule cities may have very broad powers to control their finances and fiscal affairs. N.D.C.C. § 40-05.1-06(2) authorizes the following home rule fiscal powers:

To control its finances and fiscal affairs; to appropriate money for its purposes, and make payment of its debts and expenses; to levy and collect taxes, excises, fees, charges, and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements; to contract debts, borrow money, issue bonds, warrants, and other evidences of indebtedness; to establish charges for any city or other services, and to establish debt and mill levy limitations, provided that all real and personal property in order to be subject to the assessment provisions of this subsection shall be assessed in a uniform manner as prescribed by the state board of equalization and the state supervisor of assessments. The authority to levy taxes under this subsection does not include authority to impose income taxes.

(Emphasis supplied.) You indicate that the Pembina home rule charter provision contains all these powers.

In construing similar language contained in N.D.C.C. § 40-05-01(2), (5) the North Dakota Supreme Court in Haugland v. City of Bismarck, 429 N.W.2d. 449, 453 (N.D. 1988), indicated that statutory provisions authorizing a non-home rule city to borrow money by issuing bonds did not provide the exclusive method of borrowing but rather only specified one method of exercising a city's general borrowing authority. Id. The court noted:

In our view, NDCC 40-05-01(2) generally authorizes a municipal governing body to control municipal finances, pay its debts and expenses, contract debts and borrow money, and to control municipal property. Section 40-05-01(5) specifically authorizes the borrowing of money by issuing bonds in accordance with NDCC title 21. Subsection 5 does not provide the exclusive method of borrowing money, but specifies one method of exercising the borrowing authority granted in subsection 2, particularly when general taxing powers are obligated.

Id. The court upheld the city's sale - leaseback - purchase transaction to fund improvements to city buildings and a water main without issuing general obligation bonds. Id. at 454. See also 1993 N.D. Op. Att'y Gen. 36 (July 14 to Jon Kroke) ("[A] [non-home rule] city may finance a cable television system through a loan from a local

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bank, securing the loan with the revenues derived from the operation of the cable television system and the assets of the system acquired with moneys received under the loan.")

While these authorities do not directly address the question you raise, they do point out that even non-home rule cities may have alternate ways of financing construction or improvement projects other than by the traditional methods of issuing bonds.

Moreover, for home rule cities, N.D.C.C. § 40-05.1-06 provides that the "statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, except insofar as superseded by the charters of such cities or by ordinance passed pursuant to such charters." Similarly, N.D.C.C. § 40-05.1-05 provides that the "charter and the ordinances made pursuant to the charter in such matters supersede within the territorial limits and other jurisdiction of the city any law of the state in conflict with the charter and ordinances, and must be liberally construed for such purposes." "[T]he supersession provision set out in § 40-05.1-05, NDCC, applies only to those powers set out in § 40-05.1-06, NDCC, provided they are also included in the charter and implemented by ordinance." Litten v. City of Fargo, 294 N.W.2d 628, 632 (N. D. 1980).

"A home rule city may . . . enact ordinances that supersede state statutes only if the subject matter is dealt with as part of the home rule city powers under N.D.C.C. § 40-05.1-06, and if the power is contained in the city's charter and implemented by ordinance." 1994 N.D. Op. Att'y Gen. L-123, L-125 (Apr. 15 to Charles Whitman).

"[U]sually city charter provisions supersede state laws in conflict with them only where the subject matter is purely or strictly of municipal concern and only to the extent of the conflict. . . . Illustrative of matters regarded as of purely local concern . . . [are] . . . street and other improvements and local or special assessments. . . ." 6 Eugene McQuillin, The Law of Municipal Corporations, § 21.29 (3d edition 1998).

In a 1996 opinion I noted that:

An ordinance implementing a power in a home rule charter must be sufficiently detailed so that the public is properly informed of the special assessment scheme. See Litten v. City of Fargo, 294 N.W.2d 628, 634 (N.D. 1980).

When a city is attempting to draft an ordinance to implement a provision in its home rule charter, it may be helpful to review other

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statutes on the same subject matter. If the statutes are sufficiently detailed to inform the public of the . . . [special assessment scheme], then the city may choose to pattern its ordinance after the statute. The particular terms of the ordinance need not be the same as those in the statute, however. See City of Fargo v. Fahrlander, 199 N.W.2d 30 (N.D. 1972) (ordinance need not repeat exact language of similar state statute to be valid).

1996 N.D. Op. Att'y Gen. 96, 97-98 (Aug. 16 to Garylle Stewart).

Normally, street improvements to be repaid by special assessments are financed through the issuance of improvement bonds or warrants under N.D.C.C. ch. 40-24. See N.D.C.C. § 40-24-19. However, based on the foregoing authorities the issuance of improvement bonds or warrants is not the exclusive method for financing street improvements to be repaid by special assessments for home rule cities which have the broad powers provided in N.D.C.C. § 40-05.1-06(2) in their home rule charters and have implemented them through appropriate ordinances. To the extent that such a home rule city's financing of street improvements through a loan from a local financial institution conflicts with state law providing for the issuance of improvement warrants or bonds, its charter and an appropriate implementing ordinance would supersede the state law provisions of N.D.C.C. ch. 40-24. Such an implementing ordinance might be specific to this particular transaction or more generally authorize the city to finance street improvements by borrowing from a local financial institution and repaying with special assessment collections.<sup>3</sup>

Sincerely,

Heidi Heitkamp  
Attorney General

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<sup>3</sup> Even though a home rule city may be able to borrow from a local bank to finance street improvements without issuing improvement warrants or bonds, the parties may still wish to retain bond counsel to ensure that the obligation is "tax exempt" under federal tax law and regulations, if that is what the parties contemplate. See generally 26 U.S.C. §§ 103, 141-150, and 265(b)(3) and the regulations promulgated thereunder.